RECEIVED

MAY 1 6 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

DOCKET FILE COPY ORIGINAL

COMMENTS OF MFS COMMUNICATIONS COMPANY, INC.

David N. Porter
Vice President, Government Affairs

MFS COMMUNICATIONS
COMPANY, INC.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7709

Andrew D. Lipman
Russell M. Blau
SWIDLER & BERLIN, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500
Fax (202) 424-7645

Attorneys for
MFS Communications Company, Inc.

May 16, 1996

0d14

Table of Contents

Summary

This rulemaking presents the Commission with a rare opportunity to craft a new regulatory structure that will enable the development of effective competition in the local exchange. The proposals in the *NPRM* quite properly are broad and comprehensive in scope, and MFS strongly supports the Commission's objective of promulgating detailed, specific rules of nationwide applicability to implement the 1996 Act.

MFS suggests that the Commission recognize certain overarching principles that should guide it in the implementation of the new law. First, a key goal of the 1996 Act is to open local exchange markets to competition, and the Commission must act decisively to remove any legal or practical barriers to such competition. Second, Congress intended the 1996 Act to make sweeping, even revolutionary, changes in the Nation's telecommunications regulatory framework, so the Commission should not hesitate to discard old regulatory approaches that do not fit the needs of a competitive market. Third, Congress specifically intended to encourage *facilities-based* competition in the local exchange market, so the Commission must be sure its rules provide incentives for efficient investment in facilities. Fourth, the Commission's rules should be flexible enough to cope with the highly dynamic nature of the telecommunications industry, particularly (but not solely) when addressing technical issues.

The Commission should prescribe standards for "good faith" negotiation, and should back up its rules with an expedited and effective enforcement mechanism. Experience shows that ILECs will take advantage of any opportunity the regulatory system allows them to delay, overcharge, and otherwise disadvantage their competitors.

The Commission's rules should permit telecommunications carriers to interconnect with ILECs at any point, and in any manner, that they request, unless the ILEC bears the burden of proving technical infeasibility. Forms of interconnection may include meet-point arrangements, physical collocation, or virtual collocation, among others. The same principles should apply to access to unbundled network elements. The Commission should revise its physical and virtual collocation rules both to conform to the 1996 Act and to prevent repetition of abuses that occurred under previous rules. It should also prescribe specific and detailed technical requirements and service standards for unbundled network elements, especially (but not solely) for the bottleneck loop element.

The Commission should not attempt to prescribe a LRIC cost methodology for interconnection, unbundled access, and collocation. Although LRIC is in principle the correct standard to apply, the cost study process has proven in practice to be unmanageable and ripe for abuse. Non-cost-based "proxy" methods are even less satisfactory. Therefore, the Commission should eschew trying to regulate prices directly, and instead should adopt structural requirements that will enable market forces to set the prices for these elements. The necessary requirements include public filing of *all* ILEC rates and offerings; unbundling of all services into a common set of network elements with separately stated prices; unlimited resale of all network elements and services; and wholesale rates for bundled services must at least equal the sum of rates for all component network elements. These rules will force ILECs to adopt rational, cost-based rate structures. Although these requirements may entail some significant short-term pricing disruptions, they will produce massive long-term benefits for the American economy.

Reciprocal compensation arrangements for transport and termination of traffic are at the heart of the Congressional plan to stimulate local exchange competition. Payments under these arrangements should reflect economic costs based on optimal technology, not embedded technology, in order to create economic incentives for efficiency and modernization. A single, symmetric, rate per minute must be established in order to create efficient economic incentives for both incumbents and their competitors. Although the 1996 Act permits bill and keep arrangements, it does not mandate them. New entrants should be allowed to choose bill and keep, but these arrangements should not be encouraged because they are inconsistent with cost-based pricing.

Of necessity, this summary can only touch on a few of the more significant issues raised in the *NPRM*. In the attached comments, MFS addresses in more detail the need for specific service quality standards; for strict nondiscrimination policies; for prompt filing of existing interconnection and traffic exchange agreements among non-competing ILECs; for elimination of virtually all limitations and conditions on resale; for cautious application of the "wholesale rates" provision; and for streamlined and fair arbitration procedures. MFS again urges the Commission to act boldly as it addresses these and other issues in this docket, and to reject the inevitable demands from the incumbent monopolists for compromises to protect their vested interests and to preserve the *status quo*. The unmistakable intention of Congress was to discard the *status quo* in the local exchange market, and its directives should be carried out without hesitation or equivocation.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

COMMENTS OF MFS COMMUNICATIONS COMPANY, INC.

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel, hereby submits its comments on the *Notice of Proposed Rulemaking* in the above-captioned docket (FCC 96-182, released April 19, 1996) (the "*NPRM*").[1] MFS, as the Nation's leading provider of competitive local exchange and access services, and the first carrier to offer full-service local dial tone in competition with an incumbent local exchange carrier ("ILEC"), has both a strong interest in and a unique perspective on the issues being considered in this proceeding.

I. INTRODUCTION AND OVERVIEW

The Commission established this proceeding to implement the local competition provisions of the Telecommunications Act of 1996,[2] and in particular to establish regulations as required by Sec. 251(d)(1). MFS applauds the comprehensive scope of the *NPRM*, and the Commission's apparent determination to prescribe comprehensive rules that will provide guidance both to telecommunications carriers engaged in negotiations under Section 252 of the Act and to State

[1] As directed in para. 29 of the *NPRM*, each section of these comments corresponds to a specific portion of the *NPRM*. For ease of reference, these comments use the same outline headings as the *NPRM*. Those sections on which MFS has no comments are omitted, so that the outline numbering is not necessarily consecutive. Paragraphs of the *NPRM* are cited as "para. ---."

[2] Pub. L. 104-104, 110 Stat. 56 (hereinafter "1996 Act"). Sections of the Communications Act of 1934 as amended by the 1996 Act are cited as "Sec. ---."

commissions that may be called upon to arbitrate disputes arising in such negotiations. As a practical matter, the prospects for negotiated settlement of differences will be greatly improved if both parties have a clear idea of the standards that an arbitrator will apply if they fail to reach agreement.

In addressing the many specific issues outlined in the following sections of these comments, MFS recommends that the Commission be guided by several overarching principles. First and foremost, as the Commission has already recognized (paras. 1-2, 6-8), a key goal of the 1996 Act is to open local exchange markets to competition, and the Commission must act decisively to remove any legal or practical barriers to such competition. The Commission suggests that its policies will be "pro-competition, not pro-competitor." *NPRM*, para. 12. This distinction may be easier to proclaim in principle than to follow in practice, for a very simple reason—for all practical purposes, there is no local exchange competition today. Any policy that is effective in promoting competition *must* also create opportunities for competitors that did not previously exist. Therefore, whenever the Commission's policies are truly effective in creating a "pro-competition" market environment, they will also create benefits for new entrants (and greater risks for the ILECs, who of course would be financially better off if they could retain their historical monopolies while still exploiting all the new opportunities opened to them by the 1996 Act). The Commission must anticipate and reject the inevitable complaints from the ILECs that, if Commission policies allow new entrants to compete successfully, they must be improperly "pro-competitor" policies. Further, the Commission must not be too eager to "balance" ILECs' and competitors' interests. The 1996 Act gave the ILECs many valuable opportunities to enter new markets, but the introduction of local exchange competition was expressly required as the price for entry into these new markets.[3] The Commission should not unintentionally "discount" this price by temporizing in the removal of entry barriers.

Second, as a corollary to the first principle, Congress intended the 1996 Act to make sweeping, even revolutionary, changes in the Nation's telecommunications regulatory framework. Members of Congress made clear their intention not merely to tinker with, but to replace, the regulatory system that had developed since 1934.[4] It is evident that Congress similarly intended the Commission itself to make a break with the past, and to craft a new approach to regulation. The Commission should therefore be extremely cautious in relying upon its own past decisions or on past industry practices as a model for the new regulatory regime. Old regulatory precedents, practices and procedures should be discarded if they are not consistent with the intent of the new Act.

Third, Congress specifically intended to encourage *facilities-based* competition in the local exchange market. Sec. 271(c)(1)(A) permits a Bell operating company to offer in-region interLATA

---

[3] Both Senator Hollings and Senator Kerrey stated that the conference agreement, which became the 1996 Act, was intended to ensure that the local market would be open to competition before the RBOCs were permitted to enter the interLATA market. *See* 142 Cong. Rec. S688 (Sen. Hollings), S697 (Sen. Kerrey) (daily ed. Feb. 1, 1996).

[4] Any number of legislators stressed that the 1996 Act was intended to make dramatic, not incremental, changes in regulation. For example, Senator Exon stated, "[T]his legislation illustrates that a Congress can make revolutionary change when it puts party labels aside and works together." 142 Cong. Rec. S718 (daily ed. Feb. 1, 1996). Representative Barton declared, "This [legislation] is a good piece of work, it is comprehensive, it is revolutionary. . . . [T]his legislation opens up seamless interactive communications for all Americans. . . ." *Id.* at H1160. Senator Stevens said, "This is a bill that sets new parameters. It sets new requirements. It changes the authority of the Federal Communications Commission." *Id.* at S691. Similarly, Senator Harkins remarked, "After a decade of intense debate, this legislation rewrites the Nation's communications laws from top to bottom." *Id.* at S713. Representative Stearns argued, "The 1934 Communications Act—accompanied as it is by a hodgepodge of FCC decisions and court rulings—is outdated. As we craft the communications policy that is going to carry us into the 21st Century, we must ensure that it reflects the flexibility of an ever-changing marketplace." *Id.* at H1164.

service only if it is competing with an exclusively or predominantly *facilities-based* competitor. This provision reflects the belief of Congress that only facilities-based competition will ensure a competitive local exchange telecommunications environment.[5] Congress was of course correct to provide additional incentives to facilities-based competition, for only a facilities-based entrant offers the prospect of being able to provide telecommunications facilities more efficiently than the incumbent, and thus to reduce the cost to society of providing such facilities. This both provides the facilities-based entrant with a means of reducing price to the consumer that is unavailable to a pure reseller and imposes a competitive pressure upon the incumbent to minimize its costs of providing facilities. A reseller cannot impose that pressure. This does not imply that resale competition should be discouraged—to the contrary Congress expressly provided avenues for resale entry—but rather that the Commission should avoid creating any artificial or inefficient incentives for resale in lieu of the construction of competitive facilities. *See* para. 12. It is therefore not sufficient to adopt policies that remove barriers to resale-based entry: the Commission must also consider whether there are barriers to *facilities-based* entry.

Fourth, the Commission's rules should be flexible enough to cope with the highly dynamic nature of the telecommunications industry, particularly (but not solely) when addressing technical issues. The pace of technical change in this industry is breathtaking, and it would be foolhardy for anyone to imagine that a list of network elements or forms of interconnection compiled today could

---

[5] This interpretation of Congressional intent is confirmed by statements in the legislative history. In supporting the House bill, for example, Representative Goodlatte stated that it "gives new entrants the incentive to build their own local facilities-based networks rather than simply repackaging them and reselling the local services of the local telephone company. This is important if the information superhighway is to be truly competitive." 141 Cong. Rec. H8465 (daily ed. Aug. 4, 1995).

remain accurate for more than a few months. Technological changes, in turn, affect both carriers' costs and consumer demands, and therefore change economic and marketplace conditions over time. The Commission should take pains to be sure that its rules are flexible enough to deal with the changes in network design, costs, and technology that will inevitably occur in the coming years. Accordingly, the Commission should focus on setting minimum acceptable standards for interconnection and related arrangements, but should allow flexibility both to permit arrangements that exceed the minimum, and to recognize that the minimum itself will have to change over time.

II. PROVISIONS OF SECTION 251

A. Scope of the Commission's Regulations (¶¶ 25-42)

MFS strongly endorses the adoption of uniform, pro-competitive national rules by the Commission as outlined in para. 27, and agrees with the benefits of such an approach as stated in paras. 28 and 30-32. The Commission's rules should be as specific and detailed as practicable, especially in addressing minimum service provisioning standards, service levels and pricing standards applicable to ILECs. These are the areas where disputes are most likely to arise and be most contentious. For similar reasons, it is not sufficient for the Commission simply to prescribe rules, even fairly specific ones; there must also be a swift, efficient and economical method for enforcing the rules when disputes arise. *See* page 7, below.

In addition to the benefits identified in the *NPRM*, the adoption of explicit national rules would likely facilitate the negotiation process, because both parties will have a clear idea of the terms and conditions that will govern them if they fail to reach agreement. This approach will also help reduce the transaction costs of arbitration and litigation, both in the initial arbitration process and in the implementation stage when the absence of clear standards could make it more difficult to enforce compliance with agreements and to resolve disputes over interpretation. These transaction costs are significant for both ILECs and new entrants, and especially for smaller businesses.

Contrary to the concerns stated in para. 33, explicit national rules can be adopted without impairing the authority of the States. Even the most detailed rules that the Commission might adopt in this proceeding would only prescribe minimum *standards* for the ILECs in providing interconnection and related arrangements, and could not possibly prescribe specific *outcomes* (such as specific rates for particular unbundled rate elements). The States would still have considerable flexibility, as contemplated by Secs 251(d)(3) and 252(e)(3), to apply their own policies and consider local conditions in reviewing specific inter-carrier agreements within the framework established by the Commission's implementing rules, and certainly should be able to exceed the Commission's minimum requirements as long as their decisions remain consistent with the Act.

MFS agrees with the tentative conclusions in paras. 36 through 39. Secs. 251 and 252 are quite specific regarding the respective areas of responsibility of the Commission and the States. Congress intentionally did not allocate those responsibilities in accordance with historic notions of "jurisdictional separation." The specific provisions of Sec. 251 with respect to rates, terms, and conditions of service for particular types of carrier-to-carrier arrangements must take precedence over the more general jurisdictional provision of Sec. 2(b) which applies to communications services generally.[6] As suggested in para. 40, however, MFS agrees that traditional jurisdictional concepts

[6] *See, e.g., Morton v. Mancari,* 417 U.S. 535, 550-51 (1974).

could continue to apply with respect to those common carrier services not specifically covered by Sec. 251.

In response to para. 41, MFS strongly urges the Commission to strengthen its enforcement mechanisms. MFS' experience in interconnecting with the ILECs in many metropolitan areas in a variety of ways over the past eight years has taught it that an agreement or regulatory decision making access to an ILEC facility available is only the beginning of the effort to deliver a working service to customers. Even if a facility is offered in a tariff, it is of no benefit to MFS or any other potential user until the ILEC actually installs, provides, and maintains the tariffed service in compliance with suitable technical and operational standards. MFS has experienced cases in which access to an essential facility has been offered in an ILEC tariff (after a specific order by a State commission requiring that the service be made available), but when MFS sought to order the tariffed service it was told that the ILEC was not in fact prepared to offer the service. When the ILEC finally announced that it was ready to offer the service, after a delay of many months, it repeatedly failed to install service on a timely basis and to respond to repair calls on a timely basis.

Similarly, the Commission and its staff are well aware of the many disputes that have arisen under the Commission's Expanded Interconnection rules over the past four years. Several of the ILECs have searched for every opportunity to exploit any ambiguity in the Commission's rules in order to deny MFS and other interconnectors access to particular services, to impede the use of particular equipment, to delay provisioning of service, and to discriminate against competitors' customers in the application of non-recurring charges.[7] It is almost inevitable that the same types of misbehavior will recur in the implementation of new interconnection and access arrangements under Sec. 251.

The Commission therefore must complement its substantive rules with an effective, expeditious, and economical process for resolving disputes as they arise (as they inevitably will) and for enforcing compliance with the rules. The Commission's authority under Sec. 208 extends to any complaint arising out of a violation of the Communications Act; and Secs. 251 and 252 are now part of the Act and therefore plainly fall within that authority.[8] However, the Commission should not relegate aggrieved parties to the formal complaint process as their sole means of redress. The formal complaint process is designed principally to resolve claims by customers against carriers for overbilling and other monetary damages, and, while it may serve that function adequately, it was not designed and is not effectual in resolving quickly disputes between competing carriers where the most significant remedy is not damages but quasi-injunctive relief (*e.g.*, ordering that a particular service be made available, or requiring compliance with a particular installation or repair schedule), and where time is of the essence.

In a case where an ILEC fails to provide adequate service (or any service at all) to a competitor, the enforcement process is of little value if it is not swift. If a competitor cannot provide

---

[7] *See, e.g.*, MFS written *ex parte* submissions in CC Docket No. 91-141 dated February 27, 1995, and May 5, 1995.

[8] A failure to fulfill of any of the specific "duties" set forth in Secs. 251(a)-(c) would be in contravention of the Communications Act and therefore subject to the Commission's Sec. 208 jurisdiction. It is possible, however, that some such violations could also fall within the concurrent jurisdiction of a State commission; for example, a failure to transport and terminate intrastate calls as required by Sec. 251(b)(5) could give rise to a complaint before a State commission.

service to an end user, or cannot provide the expected quality of service, due to the ILEC's failure to provide or to repair essential network elements, a dissatisfied end user will not wait for the dispute to be resolved by the Commission. The end user will simply stop using the new entrant's services and go back to using the ILEC's services. Monetary damages in this type of case are very difficult to compute, because the damages (lost profits) depend on factors that are inherently speculative—what services the end user would have purchased, and how long it would have continued as a customer, if the ILEC had not breached its obligations to the other carrier.

In order to provide swift and effective resolution of disputes arising between ILECs and their competitors, MFS proposes a two-part system. First, the Commission should designate a Staff member to act as an Ombudsman to attempt to encourage negotiated settlements of individual disputes. Second, if the parties are unable to reach a settlement, the Commission should convene meetings of all the parties involved—including the Ombudsman—during a 30-day period to discuss the issues and draft a joint recommendation to the Common Carrier Bureau. If the parties cannot agree, the dissenting party may submit a dissenting recommendation. The Bureau will then have 30 days to consider the recommendation and any dissent, and release a final order resolving the dispute. As with any final Bureau order it will be subject to petitions for reconsideration or review. This approach will provide telecommunications carriers with a highly reliable and expedited means of addressing access- and interconnection-related problems, and will ensure that all affected parties participate fully in the process.[9]

---

[9] MFS has previously described this process in more detail in its *Written Ex Parte Submission Concerning Dispute Resolution Mechanisms for Virtual Interconnection*, submitted in CC Docket No. 91-141 on December 5, 1994, which is incorporated herein by reference.

B. Obligations Imposed by Section 251(c) on "Incumbent LECs" (¶ 45)

MFS does not believe that the states are authorized to impose any of the Sec. 251(c) obligations on carriers other than ILECs, unless the Commission acts under Sec. 251(h)(2) to impose such obligations on a LEC or class of LECs. This conclusion is buttressed by the structure of the statute itself in two respects. First, Congress took great pains in subsections (a), (b), and (c) of Sec. 251 to distinguish among the duties imposed on all telecommunications carriers, on all LECs, and on ILECs only, respectively. It is implausible that Congress would have crafted these careful distinctions if it had expected them to be ignored by the states. Second, there would have been no need for the enactment of Sec. 251(h)(2) if the states were able to decide on their own to subject any LEC to the duties of an "incumbent." Rather, that provision is evidence of an affirmative legislative intent to assign this authority solely to the Commission. A statute must be construed so as "to give effect, if possible, to every clause and word . . ., rather than to emasculate an entire section."[10] Therefore, the 1996 Act must be interpreted as prohibiting the imposition of Sec. 251(c) duties on any carriers other than those ILECs defined by statute, or designated by this Commission, as "incumbents."

1. Duty to Negotiate in Good Faith (¶¶ 46-48)

MFS strongly supports the adoption of rules to implement the "good faith" negotiation requirements of Sec. 251(c)(1). Without specific guidelines from the Commission, this statutory provision will be rendered almost meaningless, since any party acting in bad faith would

[10] *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

undoubtedly deny that it was doing so. Negotiators and arbitrators should be able to focus on the substantive issues at hand without having to divert resources to litigating issues of good faith.

As noted in para. 46, both the Commission and the courts have provided some guidance on the elements of "good faith" negotiation. In addition to issues arising under the Communications Act, courts have interpreted "good faith" in other contexts, especially in labor relations law. "Good faith" is an inherently subjective standard, since it depends upon a party's state of mind, but past decisions have identified some objective indicia of good faith. For instance, parties must appoint qualified representatives who have authority to bargain.[11] The negotiators do not necessarily have to have final authority to enter into an agreement, but they must "be given authority to discuss freely contract proposals and counter proposals, enter into tentative compromises or agreements and provide clarification and limitation of disputed issues."[12] Failing to respond to a request for good-faith negotiations within a reasonable time or imposing unreasonable conditions as prerequisites to negotiation may be considered evidence of bad faith.[13] In this instance, MFS believes that insisting on broad non-disclosure agreements should be considered *prima facie* evidence of bad faith. An ILEC (or, for that matter, a new entrant) may reasonably insist on protection of particular items of

---

[11] *FCC Asks for Comments Regarding the Establishment of an Advisory Committee to Negotiate Proposed Regulations*, Public Notice, CC Docket No. 92-76, 7 FCC Rcd. 2370, 2372, para. 16 (1992); *see also Southern Pacific Communications Co. v. American Tel. & Tel. Co.*, 556 F. Supp. 825, 1006 (D.D.C. 1983), *aff'd*, 740 F.2d 1011 (D.C. Cir. 1984).

[12] *Applications of Gross Telecasting*, Docket No. 20014, 92 FCC 2d 250, para. 109 (citing *Gulf States Canners*, 224 NLRB No. 115 (1976) and *Great Western Broadcasting Corp.*, 139 NLRB No. 11 (1962)).

[13] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd. 468, para. 39 (1989).

confidential information (such as the location or capacity of specific network elements, or competitively-sensitive cost information) disclosed during negotiations; but it is not reasonable to demand that all information concerning negotiations and positions taken (including, in some instances, the fact that negotiations are taking place at all) be kept confidential. The Act itself, by requiring public disclosure of agreements in Sec. 252(h), establishes a presumption against secret negotiations.

In labor law, certain subjects (such as wages and hours) are designated as "mandatory subjects of bargaining."[14] Employers cannot refuse to discuss mandatory topics either directly, through an outright refusal, or indirectly, by engaging in so-called "surface bargaining."[15] Sec. 251(c)(1), by requiring ILECs to negotiate with respect to the duties set forth in subsections (b) and (c), appears to have created similar "mandatory subjects of bargaining" for these carriers. Therefore, just as in the case of employers under the National Labor Relations Act, ILECs have a duty to bargain substantively, not merely to engage in discussions with no real intention of reaching agreement.[16]

---

[14] *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

[15] For example, one court found the employer's duty to bargain in good faith violated by its insistence on certain wage proposals because "the Company's unalterable position was that it remain in total control of this mandatory subject of bargaining." *NLRB v. A-1 King Size Sandwiches, Inc.*, 732 F.2d 872, 875 (11th Cir. 1984).

[16] "[A]s has been long recognized, performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences." *NLRB v. American National Insurance*, 343 U.S. 395, 402 (1952). In labor cases, the courts consider whether "the content of the [employer's] bargaining proposals together with the positions taken by the [employer] are sufficient to establish that it entered into bargaining with no real intention of concluding a collective bargaining agreement." *NLRB v. A-1 King Size Sandwiches, Inc.*, 732 F.2d at 874.

As a general matter, failure to produce "reasonable proof" to substantiate claims of "economic inability" to grant concessions requested during negotiations is considered evidence of bad faith.[17] In the context of the 1996 Act, this rule suggests that if an ILEC claims in negotiations that a proposed rate is inconsistent with the pricing standards set forth in Sec. 252(d), it should be prepared to present cost data to substantiate its position, at least if that data can be obtained without undue burden. Likewise, a party claiming that a request for interconnection, unbundled access, or a similar arrangement is technically infeasible or otherwise unreasonable should be required to provide reasonable documented proof containing detailed technical justification for such assertions. The existence of current or past arrangements similar to those requested by a new entrant with end users or other carriers is sufficient to prove feasibility and to establish reasonable terms and conditions.

In para. 48, the Commission seeks comment on whether Sec. 252(a)(1) and 252(e)(1) require carriers that have existing agreements relating to duties contained in Sec. 251(b) and (c) to submit those agreements to State commissions for approval. Since Sec. 252(a)(1) explicitly and unambiguously states that "*any* interconnection agreement negotiated before the date of enactment" of the 1996 Act "*shall*" be submitted to the State commission (emphasis added), MFS fails to see why there is any issue requiring comment. *See also* page 66, below. The Commission also seeks comment on whether Sec. 252 permits renegotiation of such pre-enactment agreements. As an initial matter, Sec. 251(c)(1) and Sec. 252 apply only when an ILEC receives a request from another carrier, so if renegotiation is permissible it could only be initiated by a party other than the ILEC.

[17] *NLRB v. Truitt Mfg. Co.* 351 U.S. 149, 152-53 (1956). A party's duty to prove its claims may be limited, however, by the burden it would face in providing such proof. *Id.* at 151.

With that caveat, however, MFS submits that requiring some carriers to adhere to pre-enactment agreements while permitting others to negotiate more favorable terms pursuant to the Act would be discriminatory and would violate numerous specific provisions of the statute, including Sec. 252(i). Therefore, any carrier that entered into a pre-enactment agreement with an ILEC must be entitled to request the negotiation of new arrangements pursuant to Sec. 252.

2. Interconnection, Collocation, and Unbundled Elements

a. Interconnection (¶¶ 49-55)

MFS supports the Commission's tentative conclusion (para. 50) to adopt explicit national interconnection standards. *See* page 5, above. If the Commission's rules establish one or more minimum acceptable "default" interconnection configurations which ILECs must make available, the States still will have flexibility to consider other alternatives and to take account of issues specific to particular States or geographic regions. MFS does not believe that technical issues should be any impediment to a uniform national approach, and in its experience any local or regional differences in pre-Act interconnection arrangements are the result of economic issues, not technical ones. Based on a century of evolution, all ILEC telephone networks today use interoperable and interconnected equipment designed to a common set of standards, so there should be no significant regional or local variations in the technical criteria applicable to interconnection. On the other hand, the lack of uniform national standards could allow individual ILECs to erect artificial barriers to entry in the future, contrary to the intent of the 1996 Act, by insisting on the use of non-industry-standard interconnection practices. Accordingly, the Commission's rules should specify minimum acceptable general interconnection criteria with nationwide applicability.

In paras. 53-54, the Commission seeks comment on the relationship between "interconnection" under Sec. 251(c)(2) and "transport and termination" under Sec. 251(b)(5). Sec. 251(c)(2)(A) specifically requires ILECs to provide "interconnection . . . for the transmission and routing of telephone exchange service and exchange access;" while Sec. 251(b)(5) requires all LECs to enter into "reciprocal compensation arrangements for the transport and termination of telecommunications." These provisions suggest that Congress intended to distinguish between the physical and technical arrangements required to establish connections between two networks (interconnection) and the financial arrangements for carriage of traffic routed over these connections (reciprocal compensation). Therefore, Sec. 251(c)(2) should be construed as referring to the physical facilities and equipment physically linking two networks (and any technical criteria affecting the type of traffic that may pass over those facilities), not to the transport and termination of traffic passing over those facilities.

(1) Technically Feasible Points of Interconnection (¶¶ 56-59)

MFS believes that a "technically feasible point of interconnection" is any point in an ILEC's network where suitable transmission, cross-connect or switching facilities are present to permit the routing of traffic to and from another network. From a physical standpoint, interconnection merely requires the joining of wires or of optical fibers, which can take place at any physical location to which both carriers have access. From a technical standpoint, these wires or fibers must be attached (at each end) to compatible equipment, so that signals may be sent and received over the facility. This equipment need not be (although it could be) located at the physical point of interconnection. MFS agrees with the tentative conclusions in paras. 56 and 58 that a party alleging that interconnection at a particular point would risk harm to the network or be technically infeasible must present specific and detailed technical justification to support its claim.

MFS agrees with the suggestion in para. 57 that interconnection at a particular point should be considered technically feasible if the ILEC currently provides, or has provided in the past, interconnection to any other carrier or customer at that point. The Commission should emphasize, however, that this is strictly a "minimum" standard, as stated in the *NPRM*, and does not preclude or erect any presumption against interconnection at other locations. Further, the Commission should clarify that "a particular point" for this purpose refers to all locations having similar characteristics, and not to specific geographic locations. For instance, if an ILEC currently has meet-point arrangements with other carriers consisting of fiber splices on telephone poles, it should be required to enter into similar arrangements on *any* telephone pole where suitable hardware for the connection exists, not just on the particular poles where existing splices happen to be located.

(2) Just, Reasonable and Nondiscriminatory Interconnection (¶¶ 60-62)

The Commission should establish national minimum standards for just, reasonable, and nondiscriminatory terms of interconnection, which should include such matters as service provisioning intervals, maintenance standards, repair obligations, and joint traffic planning to ensure adequate interconnection capacity.[18] Requesting carriers should have a swift and certain remedy for violation of these standards by an ILEC, such as compensatory damages for failure to install circuits

[18] MFS has prepared a "model" co-carrier agreement which sets forth proposed interconnection standards and practices in some detail. Unfortunately, however, the strict page limits adopted by the Commission in this proceeding prevent MFS from providing a copy of this model agreement for the record.

or facilities within a defined installation interval (although any such relief should not preclude the injured party from pursuing any other remedies available to it).

(3) Interconnection that is Equal in Quality (¶ 63)

The requirement that the ILEC provide interconnection that is "at least equal in quality to that provided by the [ILEC] to itself . . . or to any other party to which the carrier provides interconnection." Sec. 251(c)(2)(C), serves to reinforce the more general requirement of non-discrimination in Sec. 251(c)(2)(D). Traffic exchange facilities between an ILEC and a competitor should be designed to meet at least the same technical criteria and grade-of-service standards (*e.g.*, busy hour probability of blocking, transmission standards) as the inter-office trunks used within the ILEC's network. Moreover, if the ILEC provides a higher grade of service to "any other party," such as a non-competing ILEC serving a neighboring territory, it must offer comparable interconnection to competitors. The Commission should specifically require that ILECs enter into two-way trunking arrangements, tandem subtending and transiting arrangements, and meet-point billing arrangements with competitors if they have entered into such arrangements with "any other party," including neighboring non-competing ILECs.

(4) Relationship Between Interconnection and Other Obligations Under the 1996 Act (¶¶ 64-65)

MFS agrees with the tentative conclusion in para. 65 that the Commission can (and should) require LECs to offer a variety of forms of interconnection, including virtual collocation and meet-point arrangements, in addition to physical collocation. Sec. 251(c)(6) requires ILECs to offer physical collocation "of equipment necessary for interconnection or access to unbundled networks[.]" Thus, Congress identified physical collocation as a particular means of achieving interconnection or access to unbundled elements, but not the exclusive means (because, if it were the exclusive means, then subsections (c)(2) and (c)(3) would not have been required). In interpreting this provision, the Commission must bear in mind the circumstances under which Congress acted. In 1992, the Commission adopted rules requiring physical collocation, which were vacated by the United States Court of Appeals on the specific ground that the Commission lacked statutory authority, under the Act as then in effect, to compel physical collocation.[19] Congress realized that an explicit reference to physical collocation in the 1996 Act was necessary to overrule the *Bell Atlantic* decision and to provide the Commission with the authority that had previously been lacking.[20] Under these circumstances, no inference can reasonably be drawn that Congress intended any limitation on the Commission's authority to require forms of interconnection other than physical collocation (especially in light of Sec. 251(i)).

Because Sec. 251(c)(2) and (c)(3) require ILECs to provide interconnection and access to unbundled network elements "at any technically feasible point," it is reasonable to infer that the party requesting these arrangements is entitled to specify the place and type of interconnection that it desires, and that the ILEC has an obligation to honor this request unless it can demonstrate that doing so would be technically infeasible. The Commission therefore need not attempt to specify a comprehensive list of permissible types of interconnection (although, at a minimum, physical collocation must be available and virtual collocation and meet point options should also be required).

---

[19] *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (hereinafter "*Bell Atlantic*").

[20] *See* H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 73 (1995) (citing the *Bell Atlantic* decision as one of several reasons for provision in H.R. 1555 requiring physical collocation).

b. Collocation (¶¶ 66-73)

As noted in the preceding section, the 1996 Act nullifies the court decision that prohibited the Commission from mandating physical collocation. When the Court of Appeals remanded the Commission's prior physical collocation requirement, it reasoned that the Commission did not have explicit statutory authority to order physical collocation. The court also distinguished between the collocation ordered by the Commission and the interconnection mandated by the Interstate Commerce Act for rail lines. The court (and the petitioning ILECs) observed that mandated interconnection of rail lines is constitutionally proper because the statute requires interconnection and some compensation.[21] The 1996 Act overcomes the deficiencies identified by the court in its analysis of the Commission's prior physical collocation rules. Sec. 252(c)(6) plainly creates an explicit statutory requirement to provide physical collocation; and, because it requires rates that are "just, reasonable, and nondiscriminatory," it also creates a compensation requirement.

The 1996 Act unambiguously requires that ILECs offer physical collocation, along with other interconnection arrangements, at the option of the requesting carrier. By the language of the 1996 Act, a requesting carrier can be required to accept virtual collocation only if an ILEC proves that physical collocation is not practical for *technical* reasons or because of space limitations. This national mandate for physical collocation requires the Commission to establish explicit national collocation policies for at least four major reasons.

[21] *Bell Atlantic*, 24 F.3d at 1446.